

Decision 05-01-060

January 27, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
SOUTHERN CALIFORNIA EDISON
COMPANY (U 338-E) for a Permit to
Construct Electrical Facilities With Voltages
Between 50 kV and 200 kV: Viejo System
Project

Application No. 03-03-043
(Filed March 21, 2003)

**ORDER DENYING REQUEST FOR LEAVE TO FILE
APPLICATION FOR REHEARING ON AUGUST 17, 2004 AND
APPLICATION FOR REHEARING OF DECISION NO. 04-07-027,
AND AFFIRMING DOCKET OFFICE'S REJECTION OF THE
LATE-FILED APPLICATION FOR REHEARING**

I. SUMMARY

By this Order, the California Public Utilities Commission ("Commission") denies the Request for Leave to File an Application for Rehearing on August 17, 2004 and Application for Rehearing ("Request for Leave to File an Application") filed by No Overhead Power Lines by Edison ("NOPE").¹ The Commission also affirms the action of the Commission's Docket Office rejecting the late-filed application for rehearing.²

¹ The full title on NOPE's filing was as follows: "Request for Leave to File Application for Rehearing on August 17, 2004 [Docket Office Receipt Date] and Application of Intervenor, N.O.P.E., Inc. for Rehearing of Decision No. 04-07-027."

² The Request for Leave to File an Application for Rehearing and the Request for Stay and for a Temporary Restraining Order were filed separately on September 9, 2004. By today's decision, we dispose of the Request for Leave to File an Application for Rehearing. The Commission will dispose of the Request for Stay and for a Temporary Restraining Order in a subsequent order. Today's order is not intended to prejudge any of the issues raised in this request.

II. BACKGROUND

In D.04-07-027 (“Decision”), we granted Southern California Edison Company (“SCE”) a permit to construct a new substation in the City of Lake Forest and certain new transmission facilities through the City of Mission Viejo as described in the Final Mitigated Negative Declaration (“FMND”). The Decision also certifies the FMND.

D.04-07-027 was issued in response to Application 03-03-043 filed by SCE on March 21, 2003. In that application, SCE sought a permit to construct a substation and additional transmission capacity in the Lake Forest and Mission Viejo areas. After reviewing SCE’s application and the Proponent’s Environmental Assessment (“PEA”), Commission staff determined that the project should be reviewed under the California Environmental Quality Act (“CEQA”).

On March 10, 2004, Commission staff issued an Initial Study and Draft Mitigated Negative Declaration (“MND”) for public comment in compliance with CEQA and Rule 17.1 of the Commission’s Rules of Practice and Procedure.³ The 30-day review and comment period required by CEQA Guidelines section 15105 closed on April 9, 2004. SCE, the City of Mission Viejo and a local citizens group, NOPE, submitted comments on the Draft MND. Commission staff reviewed the parties’ comments and modified the Draft MND and Initial Study to reflect these comments.

We held a prehearing conference on March 25, 2004 in Mission Viejo at which NOPE presented a petition signed by an estimated 3,000 local residents. The applicant, attorneys representing Mission Viejo, representatives of NOPE, and about 200 local residents attended the prehearing conference. Following the prehearing conference, the Scoping Memo and Ruling issued in this proceeding denied NOPE and Mission Viejo’s request for a public participation

³ Reference to Rule or Rules is to the Commission’s Rules of Practice and Procedure, Code of Regs., Tit. 20.

hearing at which local residents and businesses could present their views on the proposed project. The ruling found that such a hearing was not necessary because the prehearing conference provided an opportunity for more than 200 residents to speak.

Subsequently, NOPE made an informal motion seeking a public participation hearing, arguing that because the prehearing conference was not noticed as a forum for public comment, many members of the local community may have chosen not to attend. In response to this request, we held a public participation hearing on May 25, 2004 at 2pm and 6pm in Mission Viejo's City Hall. Following review of comments on the draft MND, Commission staff modified the draft MND to respond to those comments and, in some cases, modified the MND to include additional or different mitigation measures. Commission staff confirmed that SCE followed Commission rules in the utility's notification to residents. We published the FMND on June 2, 2004. We issued D.04-07-027 on July 16, 2004. The 30-day deadline for applications for rehearing expired on August 16, 2004.

NOPE alleges it e-mailed its application for rehearing of D.04-07-027 to the assigned administrative law judge ("ALJ"), Commissioners, and several staff members on August 13, 2004. On August 17, 2004, the Commission's Docket Office in San Francisco received copies of NOPE's application for rehearing via first class mail. The Docket Office rejected NOPE's application for rehearing as untimely, since the 30 days for filing an application for rehearing had expired on August 16, 2004. In its Request for Leave to File an Application for Rehearing filed on September 9, 2004, NOPE makes the following arguments: (1) the rejection of NOPE's application for rehearing by the Commission's Docket Office was unauthorized and an abuse of discretion; (2) the Findings of Fact and Conclusion of Law in the Decision fail to recognize the applicable standard of review under CEQA; (3) the Decision is contrary to law because substantial evidence set forth in D.04-07-027 and the record in this proceeding supports a fair argument that the

project may result in significant unmitigated environmental impacts; (4) the Decision violated Rule 77.7 by the unwarranted shortening of time for comment; and (5) Finding of Fact 8 was supported by substantial evidence and warrants preparation of an EIR with analysis of alternatives. SCE filed an Opposition to NOPE's Request For Leave to File an Application For Rehearing on September 24, 2004, which has been considered.⁴ SCE argues that the Commission lacks discretion to waive the deadline for untimely applications for rehearing. (Opp. to Request for Leave to File an Application for Rehearing, p. 2.)

III. DISCUSSION

On August 17, 2004, the Docket Office received NOPE's tendered application for rehearing of D.04-07-027 for filing. On that same day, the Docket Office informed NOPE that it was returning the application for rehearing as unfiled since it was untimely. The Docket Office explained to NOPE that D.04-07-027 was issued on July 8, 2004 and was mailed on July 16, 2004. Pursuant to Rule 85 of the Commission's Rules of Practice and Procedure, applications for rehearing must be filed within 30 days of the date the decision was mailed. This rule is based on Public Utilities Code section 1731,⁵ which requires that parties file for rehearing within 30 days of the mail date to have standing to challenge a Commission decision by filing a petition for writ of review. The 30-day period for applying for rehearing ended on August 15, 2004. Since August 15, 2004 was a Sunday, the last day for timely filing was Monday, August 16, 2004, pursuant to Rule 3.2.⁶ NOPE's application for rehearing was received by

⁴ NOPE filed a Reply Brief in support of its Request for Leave to File an Application for Rehearing of D.04-07-027 on October 4, 2004, which has also been considered.

⁵ Unless otherwise specified, reference to "section" is to the Public Utilities Code.

⁶ Rule 3.2 states: "When a statute or Commission decision, rule, order, or ruling sets a time limit for performance of an act, the time is computed by excluding the first day (i.e., the day of the act or event from which the designated time begins to run) and including the last day. If the last day falls on a Saturday, Sunday, or holiday when the Commission offices are closed, the time limit is extended to include the first day thereafter." We note Rule 3.2 references Code of Civil Procedure section 12.

the Docket Office on August 17, 2004, following the expiration of the 30-day deadline.

NOPE contends that we have the discretion to accept a late-filed application for rehearing. Because this decision is discretionary rather than ministerial, NOPE argues that the Docket Office could not make this decision for the Commission. (App. For Rehearing, p. 4.) SCE argues in response that the 30-day deadline is statutory and that the Commission is without discretion to waive it to allow late-filed applications for rehearing. (SCE Opp. to Request for Leave to File Application for Rehearing, p. 2.) After reviewing NOPE's and SCE's arguments, relevant statutory authority, and prior Commission decisions, we hold that the Commission does not have the discretion to accept late-filed applications for rehearing.

Several earlier decisions imply that the Commission may use its discretion under Rule 87 to allow late-filed applications for rehearing. For example, in *Southern California Gas Company* [D.90105] (1980) 4 Cal.P.U.C.2d 124, 1980 Cal. PUC LEXIS 745, we found that the 30-day deadline relates to retention of eligibility for judicial review but does not prohibit our acceptance of the application for rehearing. However, as we stated in *In the Matter of Application for Rehearing of Resolution No. L-293* [Decision No. 01-06-088] 2001 Cal. P.U.C. LEXIS 595, such decisions are aberrations from the general rule that the 30-day deadline cannot be waived. NOPE relies on dicta in this decision, which continues by stating “[e]ven if the Commission were to have such discretion, we do not believe that it is appropriate to exercise it” under the facts of that case. (*Id.* at *25.) NOPE points out that, unlike the 2001 case, where several other timely applications for rehearing raised the same issues as the untimely application for rehearing, in the instant case NOPE was the only party to attempt to file for rehearing of D.04-07-027, and that good cause thus exists for us to exercise our discretion and accept the untimely application for rehearing. We reject this argument. We determine in today's decision that due to the statutory

deadline in section 1731, which affects the finality of decisions, we lack discretion to accept late-filed applications for rehearing. Our decision overrules D.90105 to the extent it is inconsistent with this determination.

While it can be argued that section 1731 appears to only prohibit parties from filing for court review if they miss the 30-day deadline for filing applications for rehearing, section 1708 must be considered as well. Once the 30 days for filing an application for rehearing has expired, the Commission's decision is final. At that point, we cannot rescind, alter, or amend any decision without providing notice and the opportunity to be heard. In contrast, under section 1736, the filing of a timely application for rehearing allows us to abrogate, change, or modify our decision without additional notice and opportunity to be heard provided to parties, beyond that provided by the application for rehearing and the opportunity to respond to it. Accepting a late-filed application for rehearing and then subsequently, in an order on rehearing, abrogating, changing or modifying the decision without providing the requisite notice and opportunity to be heard as in the case of complaints, would violate section 1708. Therefore, once the 30 days has run and the order or decision has become final, we are without discretion to accept an untimely application for rehearing.

Where an untimely application for rehearing is tendered for filing, Docket Office could offer the applicant the choice of having the pleading retitled as a petition for modification instead of rejecting it and returning it to applicant unfiled. Although this will not confer standing in court on the applicant for rehearing, it does provide a vehicle for consideration of applicant's arguments. The applicant may request, consistent with our rules on petitions for modification, that the untimely application for rehearing be retitled as a petition for modification.⁷

⁷ See Rule 45.

We confirm that the Docket Office must reject late-filed applications for rehearing tendered for filing. Counting the days from the date of issuance to the date of filing is ministerial and does not involve any unlawful delegation of the Commission's authority since there is no exercise of discretion involved. Parties may not avoid the consequences of this ministerial action by filing a request or a motion to file an out-of-time application for rehearing, as was done here. Docket Office is instructed to summarily reject such motions or requests addressed to the Commission that ask for review of the Docket Office's ministerial action of rejecting late-filed applications for rehearing.

Further, NOPE argues that sending its application for rehearing via electronic mail to the assigned ALJ and Commissioners in this proceeding within the statutory deadline constitutes timely filing of that document with the Commission. (Request for Leave to File an Application for Rehearing, pp. 4-5.) The Commission's rules require that for documents to be considered "filed," we must receive them at the Docket Office in San Francisco, or at the Commission's offices in Los Angeles and San Diego.⁸ These documents must contain a signature by the party or the attorney filing the application for rehearing. Thus, on its face, NOPE's argument that e-mailing its application for rehearing on August 13, 2004 constitutes filing with the Commission lacks merit. According to Rule 3(d), NOPE's filing should be rejected.

NOPE also argues that because Rule 3 provides that a tendered document that does not comply with applicable rules, Commission orders, or statutes *may* be rejected, the Docket Office erred in rejecting the application as untimely under the present circumstances. (App. for Rehearing, p. 5 (emphasis in original).) NOPE's claim of legal error is unclear. This vague argument fails to comply with section 1732.

⁸ See Rules 2.2, 2.5, and 3.

To the extent NOPE is arguing that its e-mailed application for rehearing should be accepted under Rule 3(g), we disagree. Even though Rule 3(g) allows for filing of certain tendered documents that are in substantial compliance with the rules, NOPE's e-mail filing was not in substantial compliance for several reasons. Most importantly, it was untimely. The Commission cannot accept an untimely application for rehearing, once a decision has become final, by operation of law. (*See* Pub. Util. Code, §§ 1708, 1709, 1731(a).) Further, assuming that NOPE's Application for Rehearing had been e-mailed to the Docket Office, which it was not, the Docket Office does not accept e-mailed documents for filing. Thus, NOPE's argument that the Docket Office erred in rejecting its application for rehearing lacks merit.

Finally, NOPE contends in its Request to File an Application for Rehearing that it contacted our Public Advisor Office on July 16, 2004 and requested information regarding proper filing procedures for applications for rehearing. NOPE states that the Public Advisor confirmed that NOPE should continue to serve and file documents in the same manner it had served and filed documents thus far in this proceeding. (Request for Leave to File an Application for Rehearing, p. 2.) Because NOPE believed that it had properly filed documents by electronic mail earlier in the proceeding, NOPE states that in attempting to file its application for rehearing, it reasonably relied on the Public Advisor's alleged statement that NOPE should continue to serve and file documents in the same manner it had throughout the proceeding. (Request for Leave to File an Application for Rehearing, pp. 2-3.)

There is no evidence in the record that NOPE received incorrect advice from the Public Advisor. But even if NOPE had provided an affidavit detailing its claim that the Public Advisor's Office gave out incorrect information regarding the requirements for filing applications for rehearing, advice by advisory staff does not bind this Commission. NOPE's reasonable reliance argument, even

if assumed to be true, cannot require us to accept an untimely application for rehearing, which is beyond this Commission's discretion.

IV. CONCLUSION

NOPE's Request For Leave to File an Application for Rehearing is denied because the application for rehearing was tendered for filing past the 30-day deadline. We thus affirm the Docket Office's rejection of NOPE's late-filed application for rehearing. For the reasons stated above,

Therefore **IT IS ORDERED** that:

1. The Request for Leave to File an Application for Rehearing of D.04-07-027 is denied.
2. Where an untimely application for rehearing is tendered for filing, the applicant may request that the Commission's Docket Office retitle its untimely pleading, consistent with our rules on petitions for modification, as a petition for modification.
3. The Commission's Docket Office is directed to continue to reject applications for rehearing tendered for filing if untimely as established by statute and Commission rule. (*See* sections 1708, 1709, 1731(a), and 1756 and Rules 3.2 and 85.)
4. Since the law and our rules bar late-filed applications for rehearing, the Docket Office is also directed to reject motions or requests for leave to file late-filed applications for rehearing.

Dated January 27, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

Comr. Grueneich recused herself from this agenda item and was not part of the quorum in its consideration.